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Internal Revenue Service
memorandum

CC:TL:Br2
RLOsborne

date: JUN 10 1988

to: District Counsel, Laguna Niguel CC:W:LN
Attn: Steven L. Staker

from: Director, Tax Litigation Division CC:TL

subject: [redacted]

This responds to your memorandum of May 5, 1988, requesting technical advice on the following issues

Issues

1. What form is appropriate to extend the statute of limitations on assessment for the merged corporations described below?

2. Who are the proper parties to sign the consent forms extending the statute of limitations for assessment (a) for the [redacted] taxable year of the [redacted] group and (b) for the [redacted] and [redacted] taxable years of the [redacted] group?

3. Who is the appropriate corporate officer to execute the form used to extend the statute?

4. What liability is borne by the surviving corporations?

Facts

Prior to [redacted], [redacted] and [redacted]. each existed as separate parent corporations of affiliated groups filing consolidated returns. [redacted] was a Delaware corporation. [redacted]'s was a California corporation. On [redacted], [redacted] merged its subsidiary, [redacted], into [redacted]'s. [redacted]'s shareholders were bought out with cash. [redacted]'s was the surviving entity. [redacted] became the owner of [redacted]% of the stock of the new [redacted]'s. The [redacted]'s group filed its last consolidated return for the taxable year ending [redacted]. Thereafter, [redacted]'s was included in [redacted]'s consolidated tax return.

On [redacted], another corporation, [redacted] merged its subsidiary, [redacted], into [redacted]. [redacted]'s shareholders were bought out with cash. [redacted] was the surviving entity. [redacted] became the owner of [redacted]% of the stock of new [redacted], which in turn owns [redacted]% of the stock of [redacted]'s.

The IRS is considering which entity should sign an extension (Form 872) of the period for assessments in connection with the [redacted] taxable year of the old [redacted]'s group. The IRS is similarly considering which entity should sign an extension for the period for assessments in connection with the [redacted] and [redacted] taxable years of the old [redacted] group.

Discussion

The proper form for extending the statute of limitations on assessment is a Form 872. When an affiliated group filing consolidated returns ("consolidated group") goes through reconfigurations, a question often arises as to who should sign the Form 872 for a pre-reconfiguration year audit. Treas. Reg. Sections 1.1502-77(a), 1.1502-75 and 1.1502-77(d) are all potentially applicable. Regulation 1.1502-77(a) provides that a group's common parent shall be the group's sole agent for waiver purposes with respect to the group's consolidated return year. Accordingly, if a waiver relating to a pre-reorganization year is needed following a reorganization, the entity which was previously the common parent continues to act as agent for the signing of the waiver. This is the case even if the former common parent is no longer the common parent at the time it signs the waiver.

On the other hand, the reconfiguration itself may result in the termination of the old common parent. Regulation 1.1502-77(d) provides that in such event, only an entity designated by the old common parent or by the surviving members of the old group can act as agent for the old group.

Southern Pacific Co. v. Comm'r, 84 T.C. 375 (1985), provides an exception to the principle set forth in Regulation 1.1502-77(d). That case involved the merger of the old common parent into a subsidiary member of a newly created parent-subsidiary group. The new common parent of the acquiring group subsequently signed the Form 872 and received the statutory notice of deficiency for the acquired corporation's group for a pre-acquisition year. The taxpayer argued that under Regulation 1.1502-77(d), the Form 872 and statutory notice were invalid because the new common parent's subsidiary, rather than the new common parent, had been designated as the new agent for the old group.

The court ruled that the transaction was a reverse acquisition, within the meaning of Regulation 1.1502-75(d)(3), which deals with affiliated groups filing consolidated returns. That regulation applies when one corporation acquires another corporation, and the shareholders of the acquired corporation have more than 50% of the value of the stock of the acquiring corporation as a result of the acquisition. The regulation

provides that the acquired corporation's affiliated group is deemed to continue in existence, and the acquiring corporation's group is deemed to cease. Interpreting that regulation, the court concluded that in a reverse acquisition the new common parent steps into the shoes of the acquired, old common parent. The court further concluded that because the acquired, old common parent continued to exist in the form of the new common parent, Regulation 1.1502-77(d) was inapplicable. Rather, under Regulation 1.1502-77(a), the new common parent was deemed to be the continuing agent for the old acquired group in connnection with the acquired group's pre-acquisition years.

In summary, under Southern Pacific, if the old, acquired common parent dissolves in a reverse acquisition, the designation of a new agent under Regulation 1.1502-77(d) is irrelevant. The new common parent will be the agent for the old acquired group, under Regulation 1.1502-77(a), because such new parent is deemed to be the successor to, and therefore the same as, the old commmon parent.

In [redacted] and [redacted] which are currently in litigation, there was a reverse acquisition in which the old common parent did not dissolve. In connection with that case, the Tax Litigation Division sent a [redacted] to the [redacted] The memorandum [redacted]

On March 5, 1986, this Division issued a Technical Advice Memorandum in connection with the [redacted] group. After the [redacted] purchased the stock of [redacted] in [redacted], [redacted]'s subsidiary merged into [redacted]. [redacted] was the surviving entity. The memorandum emphasized that [redacted] continued its existence following the merger, even though it was not the common parent of the new group. The memorandum therefore concluded, citing Regulation 1.1502-77(a), that [redacted] was the proper party to sign a Form 872 for its pre-merger taxable years.

In the merger of [redacted] into [redacted], [redacted] was the surviving entity, even though it was not the common parent of the new group. Under Article I, Section 1.1 of the parties' Agreement of Merger and Reorganization, and under California statute, [redacted] continued in existence (and the existence of the other constituent corporation, [redacted], terminated). Cal. Corp. Code Section 1101(c) and 1107(a) (West 1977); Ortiz v. South Bend

Lathe, 120 Cal. 556, 559 (1975). Similarly, in the merger of [redacted] into [redacted], [redacted] survived, although it was not the new common parent. Under Section 1.1 of the parties' Agreement and Plan of Reorganization, and under Delaware statute, [redacted] continued its existence, while [redacted]'s existence terminated. 8 Del. Code Sections 252(a) and 259(a) (Michie's 1987); Argenbright v. Phoenix Fin. Co., 187 A. 124 (1936). Accordingly, the relevant facts are similar to the facts in the Republic merger. We conclude that under Regulation 1.1502-77(a), [redacted] should continue to be the agent for the Form 872 for the year ending [redacted]. Similarly, we conclude that [redacted] should continue to be the agent for the Form 872 for the years ending [redacted] and [redacted]. The appropriate persons to execute the Forms 872 are any duly authorized officers of the corporation. Regulation 1.6062-1(b) and Form 872.

[redacted]

[redacted]

[redacted]." Regulation 1.1502-75(d)(3) sets forth several requirements for a reverse acquisition. First, the acquiring corporation must acquire either substantially all the assets of the acquired corporation or enough stock in the acquired corporation to render the acquired corporation a member of the acquiring corporation's affiliated group. Second, the acquired corporation's stockholders, "as a result of owning stock of" the acquired corporation, must subsequently own more than 50% of the value of the acquiring corporation's stock. If these requirements are met, the acquired corporation's group is treated as remaining in existence, "with the (acquiring) corporation becoming the common parent of the group".

In the [redacted] merger of [redacted] into [redacted], [redacted] presumably acquired all the assets of [redacted], satisfying the first requirement set forth above. The sole stockholder of the acquired corporation ([redacted]) was [redacted]. [redacted] owned more than [redacted]% of the stock of the acquiring corporation, [redacted], after the merger, arguably satisfying the second requirement. Difficulty arises, however, in applying Regulation 1.1502-75(d)(3), because that section provides that in a reverse acquisition the acquiring corporation

becomes the new common parent. The acquiring corporation, [redacted], clearly could not be the new common parent, because [redacted] became [redacted]'s subsidiary in the merger. In light of this incongruity, the reverse acquisition rules probably do not contemplate this type of transaction (reverse triangular mergers). The [redacted] merger of [redacted] into [redacted] probably is not a reverse acquisition within the meaning of Regulation 1.1502-75(d)(3) for the same reason.

Even assuming that the [redacted] and [redacted] mergers were reverse acquisitions, Southern Pacific is distinguishable in that its focus was on a different group. The issue in that case was who should be the agent for the pre-merger tax years of the affiliated group. The only group that had substantial operations prior to the merger was the group whose assets were acquired in the merger -- that is, the group which was deemed to continue afterward under the reverse acquisition rules. In the [redacted] acquisition, the group which would continue in existence under the reverse acquisition rules would be the [redacted]-[redacted] group. Yet the issue in the present facts is not who should be the agent for the pre-merger years of the [redacted]-[redacted] group. Rather, the issue is who should be the agent for the pre-merger years of the old [redacted] group, i.e, the group which would discontinue under the reverse acquisition rules. Similarly, the issue in the [redacted]-[redacted] merger was who should be the agent for the old [redacted] group, which would discontinue under the reverse acquisition rules.

In light of the considerations discussed above, we conclude that even under a broad reading of Southern Pacific, that case is probably inapplicable to these mergers. Nonetheless, the matter not free from doubt. Accordingly, we recommend that you obtain the signatures of both [redacted] and [redacted] on the Forms 872 for the [redacted] and [redacted] taxable years of the [redacted] group. We recommend that you obtain the signatures of both [redacted] and [redacted] on the Form 872 for the [redacted] taxable year of the old [redacted] group. In addition, because [redacted] could conceivably be deemed the successor to [redacted], which could conceivably be deemed the successor to [redacted], we suggest that you also obtain the signature of [redacted] on the Form 872 for the [redacted] taxable year of the old [redacted] group.

You have also asked what tax liability is borne by [redacted] for the [redacted]'s group's [redacted] taxable year and by [redacted] for the [redacted] group's [redacted] and [redacted] taxable years. Because both corporations remained in existence as surviving corporations in statutory mergers, they remain primarily liable for their own pre-acquisition tax obligations.

It is important to note that the primary liability of [redacted] and [redacted] does not stem from being successors in interest to the pre-merger entities. This is not a case like Oswego Falls Corp. v. Comm'r, 26 B.T.A. 60 (1932), aff'd. 71 F.2d 673 (2d Cir.

1934). In that case the subject corporation was the successor to three corporations which consolidated and went out of existence under New York law. In the [redacted] merger, [redacted] as the surviving corporation is the successor to [redacted], because [redacted] was merged out of existence. However, post-merger [redacted] is not the successor to pre-merger [redacted], because under California statute, they are one and the same corporation. Similarly, [redacted] as the surviving corporation is the successor to [redacted], which was merged out of existence. However, [redacted] is not the successor to its own pre-merger entity, because they are the same corporation under Delaware law. Accordingly, [redacted] and [redacted] should sign the respective Forms 872, but not as successors in interest to their own pre-merger entities.

Finally, as common parent, [redacted] is severally liable for the consolidated tax owed by the [redacted] group for the [redacted] tax year. Reg. 1.1502-6(a). Similarly, [redacted] as common parent is severally liable for the consolidated tax owed by the [redacted] group for the [redacted] and [redacted] tax years.

Conclusion

1. The proper form for extending the statute of limitations for assessments is a Form 872.

2. In the mergers described above the old common parents continued their existence. Accordingly, under Regulation 1.1502-77(a), it appears that [redacted] continues to be the proper party to execute a Form 872 for the [redacted] taxable year of [redacted] group. Similarly, it appears that [redacted] continues to be the proper party to execute Forms 872 for the [redacted] and [redacted] taxable years of the [redacted] group. However, because of uncertainties as to the breadth of the Southern Pacific holding, we suggest that you take addition precautions. We suggest that you also obtain the signatures of [redacted] and even [redacted] for the [redacted] taxable year of the [redacted] group, and the signature of [redacted] for the [redacted] and [redacted] taxable years of the [redacted] group.

3. The proper officers for signing the Form 872 are any duly authorized officers of the corporation.

4. [redacted] has primary and several liability for the consolidated tax obligation of the [redacted] group for the [redacted] tax year. [redacted] has primary and several liability for the consolidated tax obligations of the [redacted] group for the [redacted] and [redacted] tax years. With respect to these liabilities, [redacted] and [redacted] are not successors in interest, but rather are the same corporations as their pre-merger entities.

MARLENE GROSS

By: _____
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